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Citations

Cases:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 209

CROWELL-COLLIER PUBLISHING COMPANY,
A DELAWARE CORPORATION,

Petitioner,

vs.

MILLARD F. CALDWELL,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Crowell-Collier Publishing Company, the defendant below, respectfully petitions for a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to review the judgment of that Court entered on April 21, 1947 (R. 38), reversing a judgment of the District Court of the United States for the Northern District of Florida dismissing the complaint in an action for libel upon the ground that it failed to state a cause of action against the petitioner.

Opinions of the Courts Below

The District Court, in holding that the complaint did not state a cause of action against the petitioner, issued a memorandum which is not officially reported, but appears at R. 29.

The opinion of the Circuit Court of Appeals is reported in 161 F. (2d) 333 and appears at R. 32.

A

Summary Statement of Matters Involved

The Complaint

Respondent, Millard F. Caldwell, Governor of the State of Florida, on March 20, 1946 instituted this action in the District Court for the Northern District of Florida against the petitioner, the publisher of the magazine Collier's, basing jurisdiction on diversity of citizenship and the existence of the requisite amount in controversy (R. 3, 4).

The complaint is grounded upon the claim that the publication involved is libelous *per se*. No special damage is alleged.

Respondent alleges, in substance, that he is a citizen of Florida and that petitioner is a corporation organized under the laws of the State of Delaware (R. 3); that petitioner is the publisher and distributor of the national weekly magazine known as Collier's; that in the February 23, 1946 issue of Collier's, which has a circulation of approximately 2,846,052 copies, there appeared on the editorial page thereof the following editorial (R. 5, 6):

> "Two Governors on Race Problems
>
> About a year ago a fourteen-year-old Negro broke into a Wilmington, North Carolina, House, raped a

pregnant woman, was caught next day, confessed and was sentenced to death. Recently Governor Cherry of North Carolina commuted the colored boy to life imprisonment, remarking in part:

'The crimes are revolting, but a part of the blame . . . arises from the neglect of the state and society to provide a better environment . . . Our public schools, equipped with capable teachers . . . (and) an effective compulsory attendance law, would do much to correct delinquency among all races.'

In Florida a few months ago, a Negro under indictment for attempted rape was snatched from jail by a mob and shot to death. Governor Millard Caldwell of Florida said he didn't consider this a lynching. He went on to opine that the mob had saved courts, etc., considerable trouble and added:

'The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination could easily be as great an injury as the original crime. This fact probably accounts for a number of killings which might otherwise be avoided.'

Thus Cherry of North Carolina expresses the forward-looking view of these matters, while Caldwell of Florida expresses the old, narrow view which has been about as harmful to Southern white people as to Southern Negroes. We can only congratulate North Carolina on its governor, and hope that Florida may have similar gubernatorial good luck before long."

The publication upon which the action is based has reference to a statement made by the respondent concerning the death of Jesse James Payne, a Negro. The statement was embodied in a letter to Mr. R. B. Eleazer of Nashville, Tennessee, which is as follows (R. 18-20):

"December 28, 1945.

Mr. R. B. Eleazer,
General Board of Education of
Methodist Church,
Methodist Building, 810 Broadway,
Nashville 2, Tennessee.

DEAR MR. ELEAZER:

I have your letter of December 20th. My statement concerning the Payne death was as follows:

'I have examined the reports covering the Jesse James Payne death, and have concluded that the disgraceful occurrence resulted from the stupid inefficiency of the sheriff and not from his abetting or participation.

The Special Grand Jury composed of eighteen qualified citizens of the County, empaneled by Circuit Judge Rowe to inquire into the affair and to make presentment on the questions of responsibility and negligence, reported that there was no negligence on the part of the sheriff and that it, the Grand Jury, was unable to determine the responsibility for the crime.

The special investigator I sent into the county reported that in his opinion the sheriff did not participate in the crime and that he did not intentionally make its commission possible.

A crime of this nature is not essentially local in character. Its significance transcends the borders of both the county and state and draws unfavorable attention to Florida.

Florida and Madison County have suffered a loss of standing in the country as the result of this affair. There was no excuse for it. The efficient administration of justice would have made it impossible, but justice in the state courts of Florida is administered by persons elected by the citizens, and efficiency of that system can be no greater than is the desire for efficiency on the part of the citizenship.

Although Sheriff Davis has in this case proven his unfitness for the office, he was, nevertheless, the choice of the people of Madison County. Stupidity and ineptitude are not sufficient grounds for the removal of an elected official by the Governor.

I want now, however, to serve a note of warning upon officials of Florida that in the future, particularly in cases of this kind, I expect the highest degree of care to be exercised.'

Whether or not the killing of Jesse James Payne was a lynching must depend upon one's definition of that term. My personal opinion is that the crime did not come within any recognized definition of lynching.

It is the duty of a Sheriff to protect his prisoners, not out of sympathy for one guilty of a heinous crime, but in fulfillment of his oath of office and defense of law and order.

The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination by defense counsel could easily be as great an injury as the original crime. This fact probably accounts for a number of killings or lynchings which might otherwise be avoided. Society has not found a solution to this problem.

My comment on the case in which you are interested is in line with my policy of holding the citizens of a county responsible for the officials they elect to office. It is my intention to awaken a sense of civic responsibility in our citizens. To that end, I have refused to do their work for them on the theory that when they have found that they must act or take the consequences they will act. Paternalism softens and deadens civic responsibility and it is my intention to stimulate the people to action and make democracy work.

Sincerely,

(S.) MILLARD F. CALDWELL,
Governor."

Respondent alleges that the editorial by direct statement, innuendo and inference, implied that (R. 7):

> "1. 'In Florida a few months ago a Negro under indictment for attempted rape was snatched from jail by a mob and shot to death.' (See Exhibit A for incident referred to. R. 15). The foregoing statement made in the editorial is not true. There is no evidence that the negro was 'snatched from the jail by a mob.'
>
> 2. The editorial after the quotation just above stated that 'Governor Millard Caldwell of Florida said he didn't consider this a lynching.'
>
> The foregoing quotation from the said editorial is not true and is a distortion and misquotation of the statement of the plaintiff, Millard F. Caldwell, that since no mob action was involved he didn't consider the murder of the negro to constitute a lynching.
>
> 3. The said editorial further stated that the said Millard F. Caldwell 'went on to opine that the mob had saved the courts, etc., considerable trouble * * *.'
>
> The foregoing statement as made in the said editorial was not true.
>
> The editorial further stated: 'The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination could easily be as great an injury as the original crime. This fact probably accounts for a number of killings which might otherwise be avoided,' which was an isolated excerpt taken from a letter written by the plaintiff, Millard F. Caldwell, on December 28, 1945, to Mr. R. B. Eleazer, General Board of Education of the Methodist Church, Methodist Building, 810 Broadway, Nashville 2, Tennessee. (See Exhibit A for full context of letter—R. 18)."

The respondent alleges, in substance, that prior to the date of the publication of the editorial involved, the petitioner transmitted to various newspapers throughout the United States advance proofs of the foregoing editorial,

calling the attention of the public to the fact that the editorial would be printed; that this publicity increased the damages resulting to the respondent by virtue of the publication, and that the respondent, learning that the editorial was to be printed, notified the petitioner by telegram, dated February 13, 1946, that it contained false, libelous and damaging statements, and that, nevertheless, the petitioner wantonly, wickedly and maliciously caused the editorial to be printed (R. 6, 7).

The respondent alleges that the editorial was published either (1) wickedly and maliciously or (2) as the result of the negligence of the petitioner, intended to, or having the effect of, injuring the respondent in his good name, fame and creed, and bringing him into contempt and ridicule before the people of Florida, and the people of the United States generally (R. 8).

The respondent alleges that he was, before his election as Governor of the State of Florida, by profession an attorney engaged in the general practice of law in Tallahassee, Florida, with clients in "many of the United States of America" (R. 12); that the respondent is now, and was at the time of the publication of the editorial involved, the Governor of the State of Florida; that he had previously represented the people of Florida in the United States Congress and in the Florida Legislature (R. 13).

The respondent further alleges that the editorial involved was calculated to create the impression that he condoned and approved lax law enforcement and lynch law, and that he was thus injured in his personal professional and political affairs (R. 14).

Reference is made in the complaint to a publication in Time Magazine of an article relating to the same subject matter as the editorial involved in this action, and to a subsequent publication in the same magazine of what is de-

scribed as a "correction, retraction and apology" (R. 9-11). It is not alleged, and the fact is, that the petitioner is neither the publisher of, nor has it any responsibility for, publications appearing in Time Magazine.

The complaint concludes with a general claim for damages in the sum of $500,000.00 (R. 14).

Petitioner's Motion

The petitioner moved to dismiss the complaint upon certain specific grounds which included the following, among others (R. 24):

> "It affirmatively appears from the allegations in the complaint that the published statements specifically complained of were true and therefore not actionable.
>
> "It affirmatively appears from the complaint that all discrepancies alleged to exist between the said publication complained of and the language admittedly used by the plaintiff were completely immaterial and that from the complaint as a whole it affirmatively appears that no cause of action arose therefrom for which defendant is responsible in damages to the plaintiff."

District Court Ruling

The District Court, by order dated June 14, 1947, granted petitioner's motion (R. 29). In granting the motion the Court stated:

> "It is the opinion of the Court that the complaint does not state a case of libel per se and that no special damages are alleged to support an action of libel 'per quod.'
>
> "It appears from the complaint that the publication, complained of was privileged."

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals reversing the District Court and ruling that the publication is libelous

per se holds that the editorial involved inferentially disparaged the respondent as a public official, and was, therefore, presumptively actionable.

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. Sec. 347 (a)).

The decision of the United States Circuit Court of Appeals, Fifth Circuit, was rendered on April 21, 1947 (R. 38). Its order denying petitioner's petition for a rehearing as handed down on June 5, 1947 (R. 43).

C

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the first amendment to the Constitution relating to the freedom of the press and freedom of speech. In addition, the fourteenth amendment to the Constitution of the United States is deemed to be also involved.

The statutory provisions are 770.01 and 770.02, Florida Statutes of 1941, relating to mandatory notice of falsity, the giving of which is a condition precedent to the institution of a suit for libel.

D

Questions Presented

QUESTION 1

Is the doctrine established by the Circuit Court of Appeals in the judgment under review, which restricts the right to comment unfavorably on the official conduct and social views of a public officer, compatible with the Federal constitutional guaranty of a free press?

QUESTION 2

Is one who publishes a statement regarding the political conduct and views of a public officer, when such article does not contain any charge of crime, corruption, gross immorality or gross incompetence, and no special damage results, to be subjected to a recovery of presumed damages as a matter of law?

QUESTION 3

In holding that the publication involved is libelous *per se*, did the Circuit Court of Appeals go counter to the decision of the Supreme Court of Florida that a communication is privileged when made in good faith by one occupying a position where it becomes right in the interests of society to make such communication or publication?

QUESTION 4

In holding that the publication involved is libelous *per se*, did the Circuit Court of Appeals go counter to the decision of the Supreme Court of Florida that a newspaper publisher is not liable for reprinting libelous news items originating and distributed by a licensed news-gathering agency, unless such publication is made with wantonness, recklessness or carelessness, or unless the same is relied upon as a libel *per quod*?

QUESTION 5

When notice of the falsity of an alleged libelous publication is required by state statute as a jurisdictional prerequisite to the institution of a suit for libel, and the obvious purpose therefor is to afford the publisher an opportunity for retraction, which, if made, will absolutely limit the right of recovery to actual damages only, does a purported notice specifying the falsity, but refusing to accept retrac-

tion or apology in satisfaction, and notifying the publisher that final instructions have been given for the institution of suit for damages, meet the requirements of the statute for the institution of such action in which no special damages are alleged or claimed?

E

Reasons Relied On for the Granting of the Writ

1. The decision sought to be reviewed is in direct conflict with the principles stated by this Court in the case of *Baumgartner* v. *United States of America*, 88 L. Ed. 1525, 322 U. S. 665, 674, that:

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

The holding of the United States Circuit Court of Appeals for the Fifth Circuit in this case denies this right, and by such denial invades the freedom of the press and unduly infringes upon the established right to criticize public men and measures.

2. The decision sought to be reviewed is in direct conflict with this Court's holding in the case of *Pennekamp* v. *Florida*, 90 L. Ed. 1295, 328 U. S. 331. It is there stated, in the opinion of Mr. Justice Rutledge, that (p. 371-372):

> "any standard which would require strict accuracy in reporting events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agen-

> cies in our democracy concerning courts as for all other instruments of government."

The Circuit Court of Appeals failed to apply the foregoing rule, and, on the contrary, ignored it in holding that Collier's publication concerning the official acts of the Governor of Florida resulting in no special damage, nevertheless, subjected the publisher to an action in which recovery of damages would be allowed as a matter of law.

3. The judgment sought to be reviewed is in direct conflict with the rule established by the Supreme Court of Florida in the case of *Layne* v. *Tribune Co.,* 108 Fla. 177, 146 So. 234, that a newspaper publisher is not liable in an action for damages for the republication of a news item emanating from a news-gathering source, unless it is shown that the publication was wantonly, recklessly or carelessly made, or unless the same be counted upon as a libel *per quod.*

4. The decision sought to be reviewed is in direct conflict with the holdings of the Supreme Court of Florida in the cases of *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109, and *Leonard* v. *Wilson,* 150 Fla. 503, 8 So. (2d) 12, to the effect that:

> "Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then, if he, bona fide, and without malice, does tell them, it is a privileged communication." (*Coogler* v. *Rhodes, supra.*)

5. The decision of the United States Circuit Court of Appeals sought to be reviewed is in direct conflict with the decision of the United States Circuit Court of Appeals for the District of Columbia in the case of *Sweeney* v. *Patterson,* 128 F. (2d) 457, which holds that:

> "It is not actionable to publish erroneous and injurious statements of fact and injurious comment or

> opinion regarding political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results. Such a publication is not 'libelous per se'."

The decision sought to be reviewed is in conflict with the above holding and establishes a new, different and dangerous rule holding that such a publication is libelous *per se* and actionable when it concerns the public conduct and views of public officials.

6. The decision sought to be reviewed overrules the well-established principle that a publication is not libelous unless in the case of a public officer it touches him in his office and has a tendency to injure him therein by an accusation which would show him unworthy of public trust and a betrayer of civil confidence, which is so aptly stated in the case of *Hills* v. *Press Co.*, 202 N. Y. S. 678, holding that in order for a statement to be libelous the publication must:

> "in the case of a public officer, touch him in his office and have a tendency to injure him therein by an accusation, which would show him unworthy of public trust and a betrayer of civil confidence."

Said decision also overrules the long-established principle that when a publication relates to a person as an officer:

> "the better opinion seems to be that to make it actionable *per se* the charge must be of such a nature that, if true, it would be cause for his removal from office."
> *Cotulla* v. *Kerr*, 77 Tex. 89, 11 S. W. 1058.

Such decision further nullifies the principle of law permitting fair comment and the right to criticize one who holds public office, which principle is clearly set forth in

Tanzer v. *Crowley Publishing Corporation*, 268 N. Y. S. 620, to the effect that such criticism:

> "may be captious, ill-timed and without foundation in fact; but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

The foregoing decisions are illustrative of the general principles applicable to publications concerning public acts of officials. The decision in the present case is in direct conflict with these holdings.

7. The decision sought to be reviewed misconstrued Sections 770.01 and 770.02 Florida Statutes, 1941, which provide that as a condition precedent to the right to institute an action for libel, the person who considers himself libeled must give notice of the publication alleged to be false to the publisher, so that the publisher may, within ten days after such notice, publish a retraction, in which event the aggrieved party is limited to the recovery of actual damages only. The Circuit Court of Appeals held that the respondent had complied with these statutes. In the instant suit, no special damages were alleged by respondent, and in his alleged notice to the petitioner he refused to accept any retraction or apology in satisfaction and he advised that one would not be accepted and that directions had been issued to his attorneys to institute the present action. Under the statute, a retraction would have satisfied the damages sued for by the respondent, since he has not alleged or claimed any special damages. The purported notice was, accordingly, not the notice required by the Florida Statute, because by its terms it was contrary to the purpose or requirement thereof. The opportunity of the petitioner to make a retraction afforded by the statute was completely nullified by the notice. In the case of *Tademy* v. *Scott*, 157

F. (2d) 826, the Circuit Court of Appeals for the Fifth Circuit held that dismissal of an action for libel is mandatory when jurisdictional notice of falsity of a publication required by State statute almost identical to the statute here involved was not given as required thereby.

The Circuit Court of Appeals erred in failing to apply here the same rule and principle which it had previously applied in connection with the case cited.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, and that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

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APPENDIX "A"

Constitutional Provision Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statutory Provisions Involved

Sections 770.01 and 770.02, Florida Statutes 1941, provide as follows:

> "770.01. Notice condition precedent to action or prosecution for libel.
>
> Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five days before instituting such action, serve notice in writing on defendant, specifying the article, and the statements therein, which he alleges to be false and defamatory."

> "770.02. Correction, apology or retraction by newspaper.
>
> If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newpaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 209

CROWELL-COLLIER PUBLISHING COMPANY,
A DELAWARE CORPORATION,

Petitioner,

vs.

MILLARD F. CALDWELL,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinion below, the statement of matters involved, jurisdiction and questions presented appear in the petition for a writ of certiorari herein, and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

Point 1. To constitute an effective protection the constitutional guaranty of freedom of the press and freedom of speech must be applied to all attempts to abridge such

freedom of expression, whether by statutory enactment, summary punishment, by contempt proceedings or by civil actions for libel in which recovery of damages is held to be authorized as a matter of law.

Baumgartner v. *United States of America,* 88 L. Ed. 1525, 322 U. S. 665;
Pennekamp v. *Florida,* 90 L. Ed. 1295, 328 U. S. 331;
Sweeney v. *Caller Times Pub. Co.,* 41 Fed. Supp. 163.

Point 2. It is not libelous to publish erroneous statements of fact and injurious comment or opinion regarding the political conduct and social views of public officials so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results.

Hills v. *Press Co.,* 202 N. Y. S. 678;
Sweeney v. *Patterson,* 128 F. (2d) 457;
Cotulla v. *Kerr,* 77 Tex. 89, 11 S. W. 1058;
Tanzer v. *Crowley Pub. Corp.,* 268 N. Y. S. 620.

Point 3. The principle decided by the Supreme Court of Florida that a publication is privileged when a person is so situated that it becomes right in the interest of society that he communicate such matter, is applicable to the publication of an article in Collier's magazine concerning the political conduct and views of Florida's Governor on the subject of lynching, a problem of vital interest to society.

Coogler v. *Rhodes,* 38 Fla. 240, 21 So. 109;
Leonard v. *Wilson,* 150 Fla. 503, 8 So. (2d) 12.

Point 4. The doctrine of the Supreme Court of Florida, as stated in *Layne* v. *Tribune Co.,* 108 Fla. 177, 146 So. 234, affording a newspaper publisher protection from an action for libel when publishing a news dispatch originated by a nationally recognized news-gathering agency, is applicable

to a weekly magazine publisher who prints an article previously disseminated throughout the United States by a nationally recognized news-gathering agency.

Point 5. A notice specifying wherein an alleged libelous publication is false, required by Sections 770.01 and 770.02 Florida Statutes, 1941, as a condition precedent to the right to institute an action for libel, is intended for the express purpose of affording the publisher an opportunity to print a retraction and thereby limited recovery to actual damages only. Such requirement is not satisfied by a notice which rejects and refuses retraction and advises the publisher that retraction will not be accepted as satisfaction and that suit has been ordered instituted. The institution of an action for libel predicated on such notice is premature where no special damages are alleged or claimed.

Tademy v. *Scott*, 157 F. (2d) 826.

III

Argument

Point 1

To constitute an effective protection the constitutional guaranty of freedom of the press must be applied to all attempts to abridge the freedom of such expression whether by statutory enactment, summary punishment by contempt proceedings or by civil actions for libel in which recovery of damages are held to be authorized as a matter of law.

The Circuit Court of Appeals has created "new law" repugnant to the Constitution of the United States.

By the decision under review the Circuit Court of Appeals has established new law to the effect that, if by any imputation, words charge that a public official entertains a belief as to a matter of public interest which is condemned

by an appreciable number of respectable people, such words are presumptively actionable.

The decision of the Court deals entirely with imputations. The Court found (R. 36):

> "The imputations here do not appear to be such as would affect the plaintiff as an attorney, if he were now practicing, but they would naturally affect him in his office as Governor."

The law, as established by the Circuit Court of Appeals, and as stated in its opinion, is (R. 36):

> "If the imputations published held the Governor up as indifferent to a lynching in his state, or condoning it, and approving the work of the mob as saving trouble to the courts, they greviously reflect on him in his office and if false and unprivileged are actionable per se, injury and damage being implied."

The finding of the Circuit Court was (R. 36):

> "We have compared the picture made by the editorial with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoing the lynching in general or this killing in particular, which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. It is not necessary that the false charges be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion, if the meaning is plain (33 Am. Jur. Libel and Slander, Sec. 9)."

Admittedly, the quotation from the respondent's statement that is to be found in the editiorial involved is a correct one. The statement quoted was:

> "The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination by defense counsel could easily be as great an injury as the original crime. This fact probably accounts for a number of killings or lynchings which might otherwise be avoided."

To say this was to question the right of one accused of crime—in this instance, Payne—to the "safeguards" of "due process" of law.

The statement was made as a part of what was no more than an evasion of the question of whether the killing of Payne was a lynching.

The statement suggests that the denial of "due process" of law in the case of Payne saved the complaining witness from an "ordeal" of the same magnitude as the original crime of which Payne had been accused.

The statement implies that there was some justification for the punishment inflicted on Payne. This philosophy is contrary to the basic principles of a free society and American government.

Nevertheless, under the new doctrine of the Circuit Court of Appeals, the respondent in his capacity as a public official, is granted immunity from effective criticism.

While the Court has not excluded the defense of truth, it is plain that the nature of the prohibited imputations is such that they would not, in most instances, admit of strict legal proof under common law rules of evidence.

In the field of inference or judgment which is the basis of criticism, there is a borderland which must be unfettered if the right of free speech is to be maintained. This has been

recognized by this Court whenever, and in whatever form the question has arisen.

In *Baumgartner* v. *United States of America*, 88 L. Ed. 1525, 322 U. S. 665, 673-4, it was stated as follows:

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

In the case of *Pennekamp* v. *Florida*, 90 L. Ed. 1295, 328 U. S. 331, Mr. Justice Reed, in delivering the opinion of the Court, stated in part as follows (p. 346):

> "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve * * *."

Mr. Justice Frankfurter, in a concurring opinion, stated in part as follows (p. 354, 357):

> "Without a free press there can be no free society.
>
> * * * * * * *
>
> "* * * The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear.
>
> "Criticism therefore must not feel cramped, even criticism of the administration of criminal justice. Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. * * *"

Mr. Justice Murphy, in a concurring opinion, stated in part as follows (p. 369, 370):

> "Were we to sanction the judgment rendered by the court below we would be approving, in effect, an un-

warranted restriction upon the freedom of the press. That freedom covers something more than the right to approve and condone insofar as the judiciary and the judicial processes are concerned. It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous."

Mr. Justice Rutledge, in a concurring opinion, stated in part as follows (p. 371, 372):

"• • • any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one.

"Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government.

"Courts and judges therefore cannot be put altogether beyond the reach of misrepresentation and misstatement. That is true in any case, but perhaps more obviously where the judiciary is elective, as it is in most of our states, including Florida."

The *Pennekamp* case involved the propriety of contempt proceedings brought against the publisher of articles concerning public acts and views of public officials. Such protection, for "misstatement of fact as well as for misjudgment" which is deemed necessary "if the press and others are to function as critical agencies in our democracy," to be any protection at all must apply to all inroads upon the freedom of such expression, whether in contempt proceedings by the judge affected or in a civil action for damages instituted by a state governor who feels offended.

Obviously, the new law announced by the Circuit Court is an overhanging threat of vast dimensions that is made

more serious by reason of its essential vagueness against the expression of ideas and matters of public concern.

We do not doubt that such a doctrine, if embodied in a statute, would be unconstitutional.

1. A statute which restricts criticism and free discussion of public men and matters of public interest is unconstitutional. *Near* v. *Minnesota,* 208 U. S. 697, 75 L. Ed. 1357.

2. In considering limitations upon the right of free speech, this Court has recognized that the issue presented is not only to be considered in the light of the facts of the case which has arisen, but also in the light of its effect in other cases which may arise. *Thornhill* v. *Alabama,* 84 L. Ed. 1093, 310 U. S. 88; *Hague* v. *C. I. O.,* 83 L. Ed. 1423, 307 U. S. 496.

3. The fact that the issue presented here has arisen in the form of a suit at common law to obtain redress for libel does not mean that a constitutional question can not be raised. It is obvious that through the extension of the law of libel a point may be reached where the freedom of the press is invaded. We believe that the point has been reached in the present case with the establishment of a new doctrine of presumptive liability of words. Unless the relation between libel and free speech is as we have described it, the recent decisions of this Court in the *Pennekamp* case and related cases protecting the right of free speech may be rendered meaningless by the manipulation of the law of libel.

It is now settled that a common law doctrine may be unconstitutional in the same measure as a statute. *American Fed. of Labor* v. *Swing,* 85 L. Ed. 855, 312 U. S. 321. And it has been pointed out that a common law doctrine may involve greater hazards to the Constitution than a statu-

tory rule because necessarily defined with less precision. *Cantwell* v. *Connecticut*, 84 L. Ed. 1213, 310 U. S. 296.

Point II

The Circuit Court of Appeals has decided an important question of law in conflict with the applicable local decisions.

As to the law applicable, the Circuit Court said (R. 35):

> "Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded. We observe, however, no substantial difference between the law of Florida and that of other common law states."

Nevertheless, the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Supreme Court of the State of Florida and with the decisions of the State and Federal Courts in other States.

A publication regarding the political conduct and social views of a public official, which does not contain any charge of crime, corruption, gross immorality and gross incompetence, and which does not result in any claim for special damage, is not actionable, even though it may involve misstatements of fact and misjudgment.

In *Layne* v. *Tribune Co.*, 108 Fla. 177, 146 So. 234, the Supreme Court of Florida said:

> "* * * the law of libel cannot be invoked to redress every casual misstatement of fact or every aggravating breach of good morals or manners in newspaper publications."

The United States Circuit Court of Appeals of the District of Columbia established the principle:

> "It is not actionable to publish erroneous and injurious statements of fact and injurious comment or

> opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made, and no special damage results. Such a publication is not libelous per se."
>
> *Sweeney* v. *Patterson*, 128 F. (2d) 457.

Similarily, in the case of *Tanzer* v. *Crowley Pub. Corporation*, 268 N. Y. S. 620, it was held that criticism of one holding public office:

> "may be captious, ill-timed and without foundation in fact; but outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

Corpus Juris sets forth the following principle:

> "The interests of society require that immunity should be granted to the discussion of public affairs and that all acts and matters of a public nature may be freely published with fitting comments or strictures. It has been held that fair comment on such matters is a right."
>
> 26 *Corpus Juris*, 1280-1281.

The public official rule derives from the declared policy of the Courts, whenever the question has arisen, that the area of permissible expression should be much broader in the case of public officials than in the case of private citizens. Declarations to that effect are uniform.

Grell v. *Hoard* (Wis.) 239 N. W. 428 (1931);

Hoan v. *Journal Co.*, (Wis.) 298 N. W. 228 (1941);

Bailey v. *Charlestown Mail Association* (W. Va.) 27 S. E. (2d) 837 (1943);

McLung v. *Pulitzer Pub. Co.* (Mo.) 214 S. W. 193 (1919);

Cohalan v. *New York Tribune*, 15 N. Y. S. (2d) 58, 172 Misc. 20 (1939).

The decision of the Circuit Court of Appeals in holding the publication involved in the present action to be libelous *per se* is in conflict with the weight of authority on this subject.

This Court stated the rule to be followed in applying local law in its decision in *Erie Railroad Co.* v. *Tompkins*, 82 L. Ed. 1188, 304 U. S. 64. Since the decision in the *Tompkins* case, this Court has repeatedly declared that asserted conflict of a decision of a Federal Court with applicable local law inherently raises a significant question concerning the interrelations of the judicial systems of the States and the Federal Government. *Wichita Royalty Co.* v. *City National Bank*, 83 L. Ed. 515, 306 U. S. 103, 107; *West* v. *American Tel. & Tel.*, 85 L. Ed. 139, 311 U. S. 223.

This Court has corrected such conflicts many times, recognizing that correction may not safely be left to the accident of subsequent litigation. The authority of the Circuit Court of Appeals, even in a matter of local law, invests its decisions with great importance as precedent throughout the country. In the present case the asserted conflict involves the democratic process itself.

Point III

The principle followed by the Supreme Court of Florida that a publication is privileged when a person is so situated that it becomes right in the interest of society that he communicate such matter, is applicable to the publication of an article in Collier's magazine concerning the political conduct and views of Florida's governor on the subject of lynching, a problem of vital interest to society.

The Supreme Court of Florida, in the case of *Coogler* v. *Rhodes*, 38 Fla. 240, 21 So. 109, adopted the following principle of law:

> "where a person is so situated that it becomes right, in the interests of society, that he should tell to a third

> person certain facts, then, if he bona fide and without malice, does tell them, it is a privileged communication (Townsh. Sland & L. 4th Ed. Sec. 209). This definition is considered more exact in leaving out the word 'duty' because it is privileged in the interests of society for a man to bona fide and without malice say those things which no positive legal duty may make it obligatory upon him to say, id. That the matter stated in accordance with the above definitions with good motives and upon reasons apparently good, should turn out to be untrue, will not render the publisher liable."

The Supreme Court of Florida has confirmed the foregoing rule in quoting with approval from 36 C. J. 1243-4 as follows:

> "the communication may be privileged by reason of either interest or duty; and the duty need not be a legal one; it may be one of imperfect obligation, such as a moral or social one. • • •
>
> "The nature of the duty or interest may be public, personal or private, either legal, judicial, political, moral or social. It need not be one having the force of a legal obligation; it may be one of imperfect obligation. • • •"

Leonard v. *Wilson,* 150 Fla. 503, 8 So. (2d) 12, 14. While the foregoing cases did not involve a newspaper or magazine publication, the principles adopted are not restrictive in their application. See

State v. *Cox* (Mo.), 298 S. W. 837; and
Bailey v. *Charleston Mail Association* (W. Va.) 27 S. E. (2d) 837.

The Florida Supreme Court, in the case of *Layne* v. *Tribune Co., supra,* recognized the public function of newspapers in the present society and their duty to publish timely information. Such court relieved the publisher from liability of such publication not actually originating with the

particular paper in which the news item appeared. This privilege attached by virtue of the social function of the publisher. The Circuit Court of Appeals erred in failing to acknowledge the social function and purpose of Collier's article and in failing to apply the privilege that attached to its publication. Such decision should be reviewed and reversed for its conflict with the principle enunciated in the foregoing Florida decisions and the decisions of sister states generally, which recognize the privilege of such publications.

Point IV

The Supreme Court of Florida, in *Layne* v. *Tribune Co.*, 108 Fla. 177, 146 So. 234, decided that a newspaper publisher was protected from an action for libel when publishing a news dispatch originating in a nationally recognized news-gathering agency. This case involved a false publication that the plaintiff was indicted for violation of the national liquor law. The publication was made in a newspaper of general circulation, being a republication of a news item originated by a national news-gathering agency. Collier's article was a republication of an article in Time Magazine with certain minor changes, the effect of which lessened the harshness of the Time article (condonation was not charged). The fact that Collier's made appropriate criticism and editorial comment based upon the republished news report should not destroy the protection afforded it by the doctrine of *Layne* v. *Tribune Co. supra.* The Circuit Court of Appeals recognized the protection afforded by the above case, but attempted to take the present case out of that holding by asserting that "authorship" by Collier's took the case out of the protective rule so laid down. This conclusion is erroneous because it overlooked the fact that the matters complained of were simply a republication by Collier's from Time Magazine, and therefore, based its decision on a distinction without a difference.

Point V

A notice specifying wherein an alleged libelous publication is false, required by Sections 770.01 and 770.02, Florida Statutes, 1941, as a condition precedent to the right to institute an action for libel, is intended for the express purpose of affording the publisher an opportunity to bring a retraction and thereby to limit the damages recoverable to actual damages. Such requirement is not satisfied by a notice which rejects and refuses retraction and advises the publisher that retraction will not be accepted as satisfaction and that suit has been ordered instituted. Institution of an action for libel under such notice is premature when no special damages are alleged or claimed. Retraction, if made, would have been, in effect, a complete bar to the action instituted by respondent, for no special damages resulted or were alleged, but the respondent in his notice invited the petitioner not to retract, stating that a retraction would not be accepted and that suit would proceed in spite of any retraction. Respondent thus in an abundance of bad faith sought to lull the petitioner into a reliance on respondent's false representation that retraction could not alter the liability of the petitioner, would not be accepted by the respondent in satisfaction, and would have no effect to stop the respondent's action for damages. Thus respondent having no action for special damages sought to keep alive and existing the injury, if any, resulting in general damages, until he could display the same before a jury. But the Legislature of Florida has prescribed that retraction following notice of falsity is a complete cure to injuries which did not result in special damages. Respondent, by his clever maneuvering which misled the petitioner, one thousand miles from Florida, to believe that retraction was neither expected, desired nor would be effective upon the litigation ordered to be instituted, has

failed to give notice contemplated by the Florida Statutes as a jurisdictional prerequisite to the institution of a suit for libel, such required notice being intended for the single purpose of affording the publisher of a newspaper or magazine an opportunity to retract and thereby cure and satisfy what general damage has resulted. The decision sought to be reviewed is in conflict with the statutory law of Florida respecting actions for libel, and is in conflict with the decision of *Tademy* v. *Scott*, 157 Fed. (2d) 826, in which the Fifth Circuit Court held the notice required by such a statute to be jurisdictional and affirmed the judgment of dismissal.

Conclusion

The judgment sought to be reviewed is in conflict with the decisions of this Court, the decisions of other Circuit Courts of Appeal, and in conflict with the decisions of the Supreme Court of Florida. It is repugnant to the constitutional guaranty and should be reviewed by this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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